

Hari Prasad Mulshanker Trivedi

Vs

V. B. Raju and Others

Civil Appeal No. 2650 (NCE) of 1972

(CJI A. N. Ray, Y. V. Chandrachud, K. K. Mathew, M. H. Beg, S. N. Dwivedi JJ)

28.08.1973

JUDGMENT

MATHEW, J. –

1. In this appeal, by special leave, the question for consideration is whether the findings arrived at by the High Court of Gujarat in Election Petition No. 9 of 1972 on issues Nos. 1 and 5, which were tried as preliminary issues, are correct.
2. An election to elect four members of the council of States from the State of Gujarat was to be held on April 8, 1972.
3. The appellant and respondents Nos. 1 to 5, filed nominations. On scrutiny, the returning officer held them to be valid. On April 8, 1972, the election was held at Gandhi Nagar and the appellant and respondents Nos. 2, 3 and 5 were declared elected.
4. On May 1, 1972, respondent No. 1 filed the election petition to declare the elections of the appellant and Respondents 2, 3 and 5 void.
5. The main ground urged in the election petition for declaring the election of respondents Nos. 4 and 5 in the election petition (respondent No. 5 and the appellant respectively here) void - with which alone we are concerned in this appeal - was that they were not ordinarily resident in the area covered by any parliamentary constituency in the State of Gujarat and that their names had been illegally entered in the electoral roll of the respective constituency in Gujarat and as they were not 'electors' within the meaning of Section 2(1)(e) of the Representation of the People Act, 1951 they were not in the election. Respondent No. 1 also raised provision other contentions in support of the declaration prayed for.
6. The Court framed issues Nos. 1 to 5 and tried them preliminarily and entered findings thereon in favour of respondent No. 1, Mr. Raju.
7. In this appeal, the appellant challenges the correctness of the findings on issues Nos. 1 and 5. These issues are :

"1. Whether there is misjoinder of parties and causes of action ?

5. Whether this Court has jurisdiction to decide whether the entries in the electoral roll regarding respondent No. 4 and or respondent No. 5 are valid or not ?"

8. Mr. B. Sen, Counsel for the appellant, did not address any argument as regards the correctness of the finding on issue No. 1.

9. We are, therefore, only concerned with the correctness of the finding on issue No. 5. As already stated, the contention on the basis of which this issue was raised was that respondents Nos. 4 and 5 in the election petition were not ordinarily resident in any of the parliamentary constituencies in the State of Gujarat and, as they had not fulfilled the condition for being entered in the electoral roll of any parliamentary constituency in Gujarat, they were not electors within the meaning of Section 2(1)(e) of the Representation of the People Act, 1951, and were ineligible to stand as candidates in the election.

10. The High Court, on a review of the decisions of this Court found that the Court has jurisdiction to go into the question whether respondents Nos. 4 and 5 in the election petition were ordinarily resident in any of the parliamentary constituencies in the State of Gujarat as that was a condition precedent to the registering officer getting jurisdiction to enter their names in the electoral roll. The reasoning of the Court was that ordinary residence in a constituency was a jurisdictional fact and the registering officer cannot, by an erroneous decision, determine the jurisdictional fact wrongly and clothe himself with jurisdiction and enter the names of respondents Nos. 4 and 5 in the election petition in the electoral roll in violation of the provisions of Section 19 of the Representation of the People Act, 1950. It is, therefore, necessary to examine the decisions of this Court to see whether the finding of the High Court is justified by those decisions.

11. Before doing so, we think it proper to refer to the provisions of the Constitution and the Representation of the People Act, 1950 and 1951 (hereinafter called the '1950 Act' and '1951 Act' respectively) which have a bearing on the subject.

12. Article 326 of the Constitution provides that the elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage that is to say, every person who is a citizen of India and who is not less than twenty-one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate legislature and is not otherwise disqualified under the Constitution or any law made by the appropriate legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election. Article 327 states that subject to the provisions of the Constitution, Parliament may by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the elimination of constituencies and all other matters necessary for securing the due constitution of such House or Houses.

13. Section 3 of the 1951 Act provides for qualification for membership of the Council of States : "A person shall not be qualified to be chosen as representative of any State of Union Territory in the Council of States unless he is an elector for a Parliamentary constituency in that State or territory." Section 2(1)(e) of that Act defines as 'elector';

"2(1)(e). - 'elector' in relation to a constituency means a person whose name is entered in the electoral roll of that constituency for the time being in force and who is not subject to any of the disqualifications mentioned in Section 16 of the Representation of the People Act, 1950."

14. Section 16 of the 1950 Act lays down the disqualifications for registration in an electoral roll

and it provides that a person shall be disqualified for registration in an electoral roll if he is not a citizen of India or is of unsound mind and stand so declared by a competent court, or is for the time being disqualified from voting under the provisions of any law relating to corrupt practices and other offences in connection with elections. Subsection (2) of Section 16 provides that the name of any person who becomes so disqualified after registration shall forthwith be struck off the electoral roll in which it is included. Section 19 of the 1950 Act lays down the conditions of registration. It provides :

"Subject to the foregoing provisions of this Part, every who

(a) is not less than twenty-one years of age on he qualifying date, and

(b) is ordinarily resident in a constituency, shall be entitled to be registered in the electoral roll for that constituency."

Section 30 of the 1950 Act bars the jurisdiction of the Civil Court to entertain or adjudicate upon any question whether any person is or is not entitled to be registered in an electoral roll for a constituency; or, to question the legality of any action taken by or under the authority of an electoral registration officer, or of any decision given by any authority appointed under the Act for the revision of any such roll.

15. Section 100(1)(a) of the 1951 Act provides that the election of a returned candidate can be declared void by the High Court on the ground that on the date of his election, the returned candidate was not qualified to be chose to fill the seat in question either in the light of the provisions of the Constitution or in the light of the provisions of the Act.

16. Under Section 100(1)(d)(i) and (iv) of the 1951 Act, the election of a returned candidate can be declared to be void by the High Court on the ground that the result of the election, in so far as it concerns the returned candidate has been materially affected : (i) by the improper acceptance of any nomination or (ii) by any non-compliance with the provisions of the Constitution or of the Act or any rules or orders made under the 1951 Act.

17. In *B. M. Ramaswamy v. B. M. Krishnamurthy* (AIR 1963 SC 458 : (1963) 3 SCR 479 : (1964) 2 SCJ 268) this Court was concerned with the provisions of the Mysore Village Panchayat and Local Boards Act, Act 10 of 1959. Under the provisions of that Act, the relevant part of the electoral roll of the Mysore Legislative Assembly was deemed to be the list of voters for the panchayat constituency and the secretary of the panchayat had to maintain a duly authenticated separate list of voters of the said constituency. It was because of this that this Court was required in that case to consider the question of the applicability of the provisions of the 1950 Act. Subba Rao, J., in delivering the judgment of the Court and that no civil Court has jurisdiction to question the legality of any decision taken by or under the authority of the electoral registration officer as the terms of Section 30 of the 1950 Act were clear that the action of the registration officer in including the name of the appellant there in the electoral roll, though illegal, cannot be questioned in a civil Court and that it would be rectified only in the manner prescribed by law or by resorting to any other proper remedy. This Court in effect held that the Court trying an election petition has no jurisdiction to go behind the electoral roll and find out whether the name of any person entered therein was illegally entered.

18. In *Baidyanath Panjiar v. Sita Ram Mahto*, ((1969) 2 SCC 447) the question was whether in view

of the provisions of Section 23(3) of the 1950 Act, the name of any person can be entered in the electoral roll subsequent to the last date for making nominations and whether that question can be gone into by the Court when trying an election petition. Section 23(3) of the 1950 Act provides that no amendment, transposition or deletion of any entry shall be made under Section 22 and that on direction for the inclusion of a name in the electoral roll of a constituency shall be given after the last date for making nominations for an election in that constituency or in the Parliamentary constituency within which that constituency is comprised and before the completion of that election. The submission before this Court was that 35 names were entered in violation of the provisions of Section 23(3) and that was without power and, therefore, the votes cast by these persons were invalid. Hegde, J., in delivering the judgment of the Court said that there was no power in the registering officer to include any name or delete any name in violation of Section 23(3), as the subsection gives a mandate to the electoral registration officer not to amend, transpose, delete any entry in the electoral roll of the constituency after the last date for making nomination for election in that constituency and before the completion of that election. He held that if any name is entered or deleted it was a case where there was a lack of power and not a case where there was an irregular exercise of it and, therefore, the Court trying the election petition could go into the question whether there was violation of Section 23(3) or not.

19. In *Kabul Singh v. Kundan Singh*, ((1969) 2 SCC 452) the question before this Court was whether the vote of a person whose name was entered in the electoral roll of the constituency after the last date for making the nomination was valid. In view of the earlier decision in *Baidyanath v. Sita Ram* (supra) this Court held that the registering officer had no power enter his name in the electoral roll in violation of the mandatory provision of Section 23(3) and as it was a case of lack of power, the Court trying the election petition had jurisdiction to go into the question. The learned Judge, in the course of the judgment, was careful to add that the right to vote being purely a statutory right, the validity of any vote has to be examined on the basis of the provisions of the relevant Acts and that in view of Section 30 of the 1950 Act, Civil Courts have no jurisdiction to entertain or adjudicate upon any question whether any person is or is not entitled to register himself in the electoral roll in a constituency or to question the illegality of the action taken by to under the authority of the electoral registration officer or any decision given by any authority appointed under that Act for the revision of any such roll. He also said that Sections 14 to 24 of the 1950 Act are integrated provisions which form a complete Code by themselves in the matter of preparation and the maintenance of electoral rolls and that entries found in the rolls are final and that they are not open to challenge either "before a Civil Court or before a tribunal which considers the validity of any election".

20. In *P. R. Belagali v. B. D. Jatti*, ((1970) 3 SCC 147 : AIR 1971 SC 1348) the question was about the validity of the election of B. D. Jatti to the legislature of the State in question from Jamkhandi constituency and one of the contentions was that as he was not an ordinary resident in Jamkhandi constituency, he was not an elector in that constituency and therefore, the election was void. Grover, J., delivering the judgment of this Court observed that in order to stand for election to the legislative assembly of a State, a person must be an elector in any assembly constituency in that State, and he must not be subject to any of the disqualifications mentioned in Section 16 of the 1950 Act or the disqualifications given in Chapter III of the Act. He also observed that the condition of being ordinarily resident in a constituency for the purpose of registration has nothing to do with the disqualifications for registration which are prescribed by Section 16 of the 1950 Act and which alone are relevant to the definition of the word 'elector' occurring in Section 2(1)(e) of the Act. He further said that the entire scheme of the 1950 Act is that entries made in an electoral roll of a constituency can be challenged only in accordance with the machinery provided by it and not in any

other forum unless some question of violation of the provisions of the Constitution is involved. The Court, therefore, held that the question whether Jatti was ordinarily resident in Jamkhandi constituency during the material period and was entitled to be registered in the electoral roll of that constituency could not be the subject of an enquiry except in accordance with the provisions of the 1950 Act and that only on the non-compliance with the provisions of the Constitution or of the 1951 Act or of any rules or orders made under that Act could the High Court declare the election of the returned candidate to be void under clause (1)(d)(iv) of Section 100 of the 1951 Act. The attention of the Court was not drawn to the decision in *Baidyanath v. Sita Ram* (supra), where it was held that non-compliance with the provisions of Section 23(3) of the 1950 Act would result in improper reception, refusal, rejection of vote which is void and would, therefore, be ground for avoiding the election under Section 100(1)(d)(iii) of the 1951 Act.

21. In *Wopansao v. N. L. Odyuo and Others*, ((1971) 2 SCC 550) this Court after referring to the decision in *Baidyanath v. Sita Ram* (supra), held that lack of power of the electoral registration officer to register or not to register persons as voters resulting from violation of the mandatory provisions of the relevant statutes might lead to improper reception, refusal or rejection of a vote and would therefore, be a ground for avoiding the election under Section 100(1)(d)(iii) of the 1951 Act.

22. Mr. Raju, respondent No. 1 submitted that the right of a citizen who fulfills the requirement of law as to age and who is not subject to any disqualifications as provided by law passed by Parliament to be registered as a voter, is a constitutional right granted by Article 326 and the remedy to enforce the right in a civil court cannot be taken away by Parliament by law and therefore Section 30 of the 1950 Act is ultra vires the Constitution. He also said that if the decision of the registering officer regarding ordinary residence in a Constituency were to be final on the question of the entitlement of a citizen to be entered in the electoral roll and if he is to have no recourse to a civil Court in case the officer decides the question wrongly, the rule of law which is a fundamental postulate of our democratic polity would be seriously impaired and, therefore, implied ouster of the jurisdiction of the Court trying an election petition to go into the question cannot be inferred.

23. We are not concerned in this case with the constitutional validity of Section 30 of the 1950 Act, for the reason that no citizen has sought to enforce his constitutional right of being registered as a voter in a court and has been denied it. It is a wise tradition with court not to adjudicate a constitutional question unless it is absolutely necessary to the disposal of the case in hand.

24. "Supremacy of law demands that there shall be an opportunity to have some court to decide whether an erroneous rule of law was applied and whether the proceedings in which facts were adjudicated were conducted regularly". This remark was made in *St. Joseph Stock Yards Co. v. United States*, (298 US 38) by Justice Brandeis in his dissenting opinion. In that case a public utility was challenging a rate order as confiscatory. "It is entirely clear that the remark is not the law with respect to much administrative action. The remark may be the law with respect to some administrative action, but if so, that action is not clearly identifiable. (See *Kenneth Culp Davis "Administrative Law Treatise"*, Vol. 4, p. 98) But the question still remains whether the Brandeis remark has validity for some types of administrative action, and if so, what types. On this question the opinions are singularly unhelpful. One may surmise that the Brandeis remark has validity in the context in which it was uttered - a public utility rate case in which confiscation was claimed. (Ibid, p. 102) Article 327 gives full power to Parliament subject to the provisions of the Constitution to make laws with respect to all matters relating to or in connection with elections including the preparation of electoral rolls. It was, therefore, open to Parliament to prescribe the mode of the preparation of the electoral roll and say, that it is not liable to be challenged except in the manner

provided. Parliament was, therefore, competent, subject to the provisions of the Constitution, to exclude the jurisdiction of the civil Court or the tribunal trying an election petition to go into the question whether the name of any person has been entered therein illegally. The right to stand for election is a statutory right and the statute can therefore regulate the manner in which the right has to be enforced or the remedy for enforcing it. We think that the 1950 Act provides a complete code so far as the preparation and maintenance of electoral rolls are concerned. The Act enacts a complete machinery to enquire into claims and objections as regards registration as voter and for appeals from the decision of the registering officer (see Section 21 to 24 of the 1950 Act both inclusive). Elaborate rules have also been made for inquiry into claims to be registered as voters and for considering and disposing of objections thereto (see Rules 12 to 24 of the Registration of Electoral Rules). The definition of the word 'elector' in Section 2(1)(e) of the 1951 Act would indicate that a person whose name is actually entered in the electoral roll for the time being and who is not subject to any of the disqualifications in Section 16 would be an elector. Any person who is a citizen of India and who has attained the age prescribed by law, subject to the minimum as provided in Article 326, is entitled to be registered as a voter in the roll of electors. This is the positive way of expressing eligibility for registration as a voter. He should not also be subject to any of the disqualifications prescribed by Parliament by law on the grounds mentioned in the article. The Parliament has prescribed in Section 16 of the 1950 Act the disqualifications.

25. The question whether a person whose name is entered in the electoral roll is qualified under the Constitution and whether he suffers from any of the disqualifications specified in Section 16 can always be gone into by the Court trying an election petition. The electoral roll is never conclusive or final in respect of these matters [see the decision in *P. R. Belagali v. B. D. Jatti* (supra)]. The argument that the question whether a person is ordinarily resident in a constituency for the purpose of registering him as a voter is a jurisdictional fact, and therefore the registering officer cannot by a wrong decision give himself jurisdiction to enter his name in the electoral roll, revives all the caustic difficulties spawned by the doctrine of jurisdictional fact and the practical difficulty of formulating a test to distinguish jurisdictional fact from other facts. See in this connection the concurring judgment of Justice Frankfurter in *William Murray Estep v. U.S.A.*, (327 US 114, 142) and the dissenting judgment of Brandeis, J., in *Letus N. Crowell v. Charles Benson*. (285 US 22) The basis for identifying jurisdictional facts has never been clarified. And, reflection on many of the reported decisions dealing with the subject will only serve to induce a feeling of desperation. We infer an intention to withhold Judicial review in the situation with which we are concerned as we think that the Parliament was acting upon the conviction that it was dealing with matters which were fully lodged in the exclusive jurisdiction of the registering officers and the appellate authorities.

26. As already stated, the prayer in the election petition was to declare the election of the respondents Nos. 4 and 5 void on (sic) the election petition under Section 100(1)(a) for the reason that these respondents were not qualified, or, disqualified to be chosen to fill the seat under the Constitution or the 1951 Act. There was no case for respondent No. 1 that these respondents suffered from any of the disqualifications mentioned in Section 16. Nor was there any ground taken in the election petition that they had not the positive qualifications as required by the Constitution or the Acts.

27. The only question is whether the ground taken in the election petition that since these respondents were not ordinarily resident in any of the Parliamentary constituencies of Gujarat, they had not fulfilled one of the conditions necessary to be satisfied for registration in the electoral roll, can be gone into by the High Court in trying an election petition.

28. We think that neither the decision of this Court in *Baidyanath Panjjar v. Sita Ram Mahto* (supra) which took the view that violation of Section 23(3) of the 1950 Act in entering or deleting the names of persons in the electoral rolls after the last date for making nomination relates to lack of power, nor the decision in *Wopanso v. N. L. Odyuo* (supra) and others which also suggests that where there was lack of power, the question can be gone into by the Court trying an election petition, can, by analogy, be extended to an entry in the electoral roll on the basis of a wrong adjudication of the question of ordinary residence. Though the dividing line between lack of jurisdiction or power and erroneous exercise of it has become thin with the decision of the House of Lords in *The Anisminic case*, ((1967) 3 WLR 382) we do not think that the distinction between the two has been completely wiped out. We are aware of the difficulty in formulating an exhaustive rule to tell when there is lack of power and when there is an erroneous exercise of it. The difficulty has arisen because the word "Jurisdiction" is an expression which is used in a variety of senses and takes its colour from its context, (see per Diplock, J., at p. 394 in the *Anisminic case*). Whereas the 'pure' theory of jurisdiction would reduce jurisdictional control to a vanishing point, the adoption of a narrower meaning might result in a more useful legal concept even though the formal structure of law may lose something of its logical symmetry. "At bottom the problem of defining the concept of jurisdiction for purpose of judicial review has been one of public policy rather than one of logic". (S. A. Smith : "Judicial Review of Administration Action", 2nd Edn., p. 98) And viewed from the aspect of public as reflected in the provisions of the 1950 and 1951 Acts, we do not think that a wrong decision on a question of ordinary residence for the purpose of entering a person's name in the electoral roll should be treated as a jurisdictional error which can be judicially reviewed either in a civil Court or before an election tribunal.

29. And concerned as we are in this case only with the question whether the High Court trying an election petition has jurisdiction to try and decide whether these respondents were ordinarily resident in the respective Parliamentary constituency in Gujarat, we should think the matter is concluded by the decision of this Court in *Jatti's case* (supra).

30. The requirement of ordinary residence as a condition for registration in the electoral rolls is one created by Parliament by Section 19 of the 1950 Act, and as we said, we see no reason why Parliament should have no power to entrust to an authority other than a court or a tribunal trying an election petition the exclusive power to decide the matter finally. We have already referred to the observation of this Court in *Kabul Singh's case* (supra) that Sections 14 to 24 of the 1950 Act are integrated provisions which form a complete code in the matter of preparation and maintenance of electoral rolls. Section 30 of that Act makes it clear that civil Courts have no power to adjudicate the question. In these circumstances we do not think that it would be incongruous to infer an implied ouster of the jurisdiction of the Court trying an election petition to go into the question. The inference is strengthened by the fact that under Section 100(1)(d)(iv) of the 1951 Act the result of the election must have been materially affected by non-compliance with the provisions of the Constitution or of that Act or of the rules, orders made under that Act in order that High Court may declare an election to be void. Non-compliance with the provisions of Section 19 of the 1950 Act cannot furnish a ground for declaring an election void under that clause.

31. We, therefore, return to the question whether these respondents were not qualified or were disqualified to be chosen to fill the seat under the Constitution of the 1950 Act or the 1951 Act. As we said, there was no allegation that they were disqualified under Section 16 of the 1950 Act. Nor was there any ground taken that they were not qualified in the sense of their being not citizens or under the age as required. As their names were entered in the electoral roll and as they did not suffer from any of the disqualifications mentioned in Section 16 in of the 1950 Act, they were electors

within the definition of the term in Section 2(1)(e) of the 1951 Act. They were, therefore, qualified to be chosen as candidates under Section 3 of the 1951 Act.

32. We think that the intention of the Parliament to oust the jurisdiction of the Court trying an election petition to go into the question whether a person is ordinarily resident in the constituency in the electoral roll of which his name is entered is manifest from the scheme of 1950 and the 1951 Acts. It would defeat the object of the 1950 Act if the question whether a person was ordinarily resident in a constituency were to be tried afresh in a court or tribunal, trying an election petition.

33. We reverse the finding of the High Court on issue No. 5 and allow the appeal to that extent and dismiss it in other respects. In the circumstances we make an order as to costs.

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